IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~[illegible]~~ #2

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 163

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., JIM DAN, DIANE HIRSCH, AND FARREL BROSLAWSKY,

Appellees.

BRIEF FOR APPELLEES

Opinion Below

The Opinion of the District Court (R. 18-38) was rendered on March 1, 1968, and is reported at 281 F.Supp. 507.

Jurisdiction

The preliminary injunction issued by the District Court was entered on March 11, 1968 (R. 16-17). Notice of appeal from the aforesaid preliminary injunction (R. 39-40) was filed on April 9, 1968. The appeal was docketed June 6, 1968, and probable jurisdiction was noted on January 13, 1969. The jurisdiction of this Court is invoked under 28 USC 1253.

Questions Presented

1. Whether the District Court correctly held that §§11400-11402 of the California Penal Code (Criminal Syndicalism) are facially unconstitutional, in violation of the First and Fourteenth Amendments.

2. Whether under the Supremacy clause (Article VI, Section 2) the California Criminal Syndicalism Law has been superseded and preempted by federal legislation.[1]

Constitutional Provisions and Statutes Involved

The provisions of California Penal Code §§11400, 11401 and 11402; 18 USC 2385, 28 USC 2283 and 42 USC 1983 are set forth in the brief for the appellant (Br. 3-6). The following pertinent constitutional and statutory provisions are also involved.

1. The First Amendment provides in part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people

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[1] In his notice of appeal, appellant presented only two questions: whether the decision of this Court in *Whitney* v. *California*, 274 U.S. 357 was binding upon the District Court, and whether the California Criminal Syndicalism Law was unconstitutional on its face (R. 40). Appellant's jurisdictional statement was limited to the same two questions (Jurisd. St. 4). Following the docketing of the appeal and after a motion to affirm had been made by appellees, the Attorney General of the State of California, at the request of this Court, filed a brief and for the first time presented questions involving 28 USC 2283, and the standing of some of the appellees to raise the constitutional questions (Brief 2).

At no time in the proceedings before the District Court below did the appellant ever raise the issue of 28 USC 2283 or the standings of the parties.

peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Fourteenth Amendment provides in part:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Supremacy clause, Article VI, cl. 2, provides as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

4. 28 USC 1343 provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: • • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Statement

The complaint in the case herein (R. 2-9) was filed on July 21, 1967 (R. 1). The appellees invoked the jurisdiction of the District Court under 28 USC 1331; 42 USC 1983; 28 USC 1343(3); and 28 USC 2281 and 2284 (R. 2). The appellees are all citizens of the State of California and of the United States. Appellees Dan and Hirsch are members of the Progressive Labor Party, an organization which advocates the replacement of capitalism by socialism, ownership of the means of production by the working people of the country, the abolition of the profit system, and the creation of political institutions organized and operated by and in behalf of the overwhelming majority of the people in the nation (R. 3). Appellee Broslawsky is an instructor in history at Los Angeles Valley College (R. 3). The appellant is the District Attorney of the County of Los Angeles, State of California (R. 3).

The complaint set forth the provisions of California Penal Code §§11400-11401, referred to as the California Criminal Syndicalism Act (R. 3-4, 8-9). The complaint alleged that the provisions of the statutes, on their face, are void and illegal in violation of the provisions of the First and Fourteenth Amendments. It was alleged that the provisions of the California Criminal Syndicalism Act violate the fundamental guarantees of free speech, press, assembly, and the right to petition the government for redress of grievances; that the provisions operate as a prior restraint

upon freedom of expression and the circulation of the press; that they violate the guarantee of due process of law in that the statutes are so vague and indefinite as to fail to meet the requirement of certainty in criminal statutes; and that they invade areas preempted by laws of the United States and, therefore, violate the Supremacy clause, Article VI, Section 2, of the Constitution (R. 4).

The complaint further alleged that appellee Harris had been charged with and subjected to indictment for violation of the California Criminal Syndicalism Act, for distributing and circulating leaflets bearing the imprint of the Progressive Labor Party; that by reason of said prosecution and the presence of said Act, appellee Harris was inhibited in the exercise of his First Amendment rights; that appellees Dan and Hirsch, by reasons of the presence of the Act and the prosecution of appellee Harris, felt inhibited in attempting through peaceful, non-violent means to advocate the program of the Progressive Labor Party which advocates doctrines and precepts seeking change in industrial ownership and control and effecting political change; and that appellee Broslawsky as an instructor of history, by reason of the presence of the Act and the prosecution of appellee Harris, felt inhibited and uncertain as to what he might say and teach since the said appellee teaches about the doctrines of Karl Marx and reads from the Communist Manifesto and other revolutionary works as part of his class work (R. 4-5). The appellees alleged that they were and continue to be subjected to irreparable injury and deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States (R. 5-6).

The complaint also alleged that prior to filing of the complaint, appellee Harris had moved in the state court to dismiss the indictment against him on the ground of the unconstitutionality of the said Criminal Syndicalism Act under the United States Constitution; that said motion had been denied by the Superior Court; that appellee had then timely filed a petition for writ of prohibition in the appropriate intermediate appellate court upon the ground of the unconstitutionality of the Act; that said petition was denied without opinion; and that the California Supreme Court thereafter denied a hearing (R. 6). The prayer of the complaint was for the convocation of a three-judge federal court, for the granting of a preliminary and permanent injunction against the enforcement of the said provisions of the California Penal Code, and for such other and further relief as to the court seemed proper (R. 7-8).

On August 8, 1967, a temporary restraining order was granted by the Honorable William P. Gray, a Judge of the United States District Court for the Central District of California (R. 10-12). Thereafter, a three-judge federal court composed of Circuit Judge Jertberg and District Judges Gray and Ferguson was convened (R. 13-15). Thereupon, the appellant moved to dismiss the complaint and the cause came on for hearing on the appellees' motion for a preliminary injunction and upon appellant's motion to dismiss (R. 1). On March 11, 1968, the District Court rendered its unanimous decision (R. 18-38).

On the duty of the court to resolve the basic constitutional questions presented by the complaint and the motion to dismiss, the District Court pointed initially to the fact that proceedings had been initiated in all the State Courts of California, seeking a ruling on the constitutional validity

of the Act prior to recourse to the Federal Courts (R. 21). In view of this state of the record, and in light of the decisions in *Dombrowski* v. *Pfister,* 380 U.S. 479 and *Zwickler* v. *Koota,* 389 U.S. 241, the Court held that abstention would be inappropriate if the California Criminal Syndicalism Act unconstitutionally abridged free expression (R. 22-23).

With respect to appellant's "principal contention" (R. 24), the District Court held that it did not feel itself bound by the decision in *Whitney* v. *California,* 274 U.S. 357. The Court held that subsequent decisions, such as *N.A.A.C.P.* v. *Button,* 371 U.S. 415, and *Baggett* v. *Bullitt,* 377 U.S. 360, pointed to the need for determination as to whether the Act was impermissibly vague and overbroad (R. 24-26). The Court held that in the light of First Amendment requirements and Supreme Court rulings, it was necessary to consider the statute as a whole, irrespective of its limited applicability to the parties challenging it, and irrespective of whether a statute might be drawn with narrow specificity to apply to such parties (R. 26-27).

Turning to the provisions themselves, the Court's analysis plainly established that the provisions of each of the sections of the California Criminal Syndicalism Act were, on their face, unduly vague, ambiguous and overbroad and, therefore, in violation of the guarantees of the First and Fourteenth Amendments (R. 27-36).

Finally, the District Court held that the declaration that the Act was unconstitutional on its face was all of the relief that was probably necessary to be accorded to appellees, since it was assumed that as long as the decision stood, the appellant would refrain from further prosecutions under the Act (R. 38). However, out of concern that to

withhold injunctive relief might deprive appellant of the right to appeal under 28 USC 1253, it was decided that a temporary injunction would issue by separate order (R. 38). On March 11, 1968, therefore, a preliminary injunction was filed by the District Court, enjoining and restraining any further prosecution of the pending criminal action against appellee Harris (R. 16-17). The notice of appeal by appellant followed on April 9, 1968 (R. 39-40).[2]

ARGUMENT

Summary of Argument

1. The California Criminal Syndicalism Act abridges freedoms of speech and press, assembly and association, and the right to petition for a redress of grievances. The provisions of the Act are uncertain and overbroad and constitute a prior restraint upon and a deterrent to the exercise of First Amendment freedoms.

A portion of Appellant's Brief appears to be an appeal to political expediency, with emphasis placed upon imma-

[2] The appellant has included in his "Statement" certain matters which are no part of the record (Br. 6-7). The extraneous references are inaccurate and a distortion of the facts. The two-count indictment returned against appellee Harris was merely in statutory language and each count included a copy of the leaflet which appellee Harris allegedly distributed. The so-called "Watts riot" preceded by many months the date of the distribution of the two leaflets as alleged in the indictment, and the distribution did not occur in the black community in Watts, but at the Civic Center, where no "tensions generated" by the alleged riot were in evidence. The indictment returned against appellee Harris did not allege "the social context of matrix of his action" (Br. 8) or "whether there was in fact a clear and present danger of violence or terrorism" (Br. 8).

terial and incompetent documents and unsubstantiated statements of alleged fact, unrelated to the record in this case. Such an appeal is wholly inappropriate in a judicial proceeding.

The real significance of appellant's presentation is that the State proposes that the California Criminal Syndicalism Act be upheld despite its plain invalidity, and that the right to advocate, teach, print and publish, and organize be sacrificed to governmental control in the interest of what the State considers to be desirable public policy. The Act is a "speech" statute and not a conduct statute. The Act cannot be supported as a means of dealing with unlawful conduct or speech brigaded with unlawful conduct. California is protected with a plenitude of existing criminal legislation for that purpose.

2. There is no serious dispute that the provisions of the California Criminal Syndicalism Act are facially unconstitutional. It is plain that the decisions of this Court since *Whitney* have so interpreted the provisions of the First Amendment as to render such statutes as the California Criminal Syndicalism Act clearly unconstitutional.

The appellant argues that the California Act, as construed by the California courts in the past, is constitutional. However, a cursory review of the California decisions from 1919 to 1955, the last time the Act was referred to, indicates that appellant is mistaken. The Act has been constantly construed to punish advocacy of abstract doctrine, to punish the exercise of freedoms of association and assembly, and acts or conduct which clearly constitute no more than guiltless behavior.

Appellant does not argue that the District Court should have abstained from passing upon the constitutionality of the Act, but he contents himself with urging that the District Court should have construed the statute to save it from unconstitutional infirmity. It is urged that the *Dennis* gloss should have been placed upon the statute by the District Court.

The argument that the District Court should have construed the state statute to save it from constitutional attack is without merit. The District Court could not appropriately make such a construction, and it is doubtful that *Dennis* can be resorted to in the light of the subsequent decision of this Court in *Keyishian*. Moreover, such laws as the Criminal Syndicalism Act are so pervasively censorial and so patently restrictive of the exercise of First Amendment freedoms that no construction would remove the uncertainty and overbreadth of the law. The deterrent to the exercise of First Amendment freedoms would still exist.

It must not be overlooked in this case that the state courts were requested to pass upon the constitutionality of the California Criminal Syndicalism Act and declined to do so. The District Court was therefore bound to pass upon the constitutional claims presented by appellees and, having done so, the District Court had no other recourse but to declare the Act patently unconstitutional.

3. Appellant urges that some of the appellees did not have standing to attack the validity of the statute, and that the District Court was without jurisdiction to afford such appellees declaratory relief. The appellant appears to overlook the fact that the complaint urged that these appellees,

as members of a political party, and as a teacher, were advocating and teaching doctrines which appellees felt inhibited in advocating and teaching because of the presence of the statute and the prosecution of one of the appellees under the Act. Appellant's motion to dismiss the complaint accepted these allegations as true.

Appellant argues that the particular appellees stood in no danger of prosecution and therefore no "controversy" was presented. However, the complaint prayed not only for an injunction but for a declaratory judgment that the Act was unconstitutional on its face. This Court emphasized in *Dombrowski* that persons were not required to risk prosecution to test overbroad statutes, and that so long as such statutes remain available to the State the threat of prosecutions of protected expression is a real and substantial one. The decisions of this Court as well as the lower courts are opposed to appellant's position.

4. The Act has been superseded and preempted by Congressional legislation. The field of sedition has been pervasively occupied by Congressional legislation such as the Smith Act, the Internal Security Act, the Communist Control Act and other Congressional measures.

In the light of the decision of this Court in *Nelson,* state sedition, criminal anarchy and criminal syndicalism statutes appear plainly superseded. *Uphaus* reaffirmed *Nelson;* it did not overrule *Nelson.*

5. 28 U.S.C. 2283 does not bar the grant of injunctive relief under 42 U.S.C. 1983. This issue was not raised by appellant before the District Court, nor in his Jurisdictional Statement. Appellant's position is, in any event, untenable.

Section 2283 does not involve the jurisdiction of the Court, and does not prohibit in all cases injunctions staying proceedings in a state court. It is not a question of jurisdiction, but a question of comity which appellant is essentially invoking. However, we are dealing here with a state statute which is clearly unconstitutional; a statute which by its very presence acts as a serious restriction upon the exercise of basic freedoms. The language of the statute is extremely broad and vague and uncertain. It is against the enforcement of this statute that appellee Harris sought the protection of a Federal Court. The appellee sought the protection of Federal rights in a Federal forum, and a Federal Court was without power to deny him relief.

Appellees submit that the injunctive relief granted below was "expressly authorized by Act of Congress". Not only do law and history support the grant of injunctive relief in §1983 actions under the circumstances herein but, in any event, it is submitted that prosecutions under statutes which are so clearly unconstitutional on their face as the California Criminal Syndicalism Act should be enjoined by a Federal Court if the Constitution and laws of the United States are to be maintained in our Federal System.

I.

The Provisions of California Penal Code §§11400-11402, the California Criminal Syndicalism Act, Are Unconstitutional on Their Face. The Act Abridges Freedoms of Speech and Press and the Right of the People Peaceably to Assemble and to Petition the Government for a Redress of Grievances. The Vagueness, Ambiguity and Overbreadth of the Language of the Act Constitute a Prior Restraint Upon, and a Deterrent to, the Exercise of Such Freedoms. The Act Clearly Violates the Provisions of the First Amendment Subsumed Into the Due Process Clause of the Fourteenth Amendment as a Limitation on State Action.

On this issue, the appellant has divided its brief into two segments, marked respectively, "A. Background" and "B. The California Criminal Syndicalism Act, as construed by our state courts, is not unconstitutionally vague or overbroad" (Br. 15-26). The appellant also includes certain exhibits as an appendix to its brief in connection with its discussion under subdivision "A" (Br. 1-19).

A. Appellant's discussion under "A" has, of course, no relation to the record in the case herein. It is frankly and avowedly an appeal to political expediency. As against such a similar request to make the courts the effective instruments of arbitrary suppression at the behest of executive officers of the State, a learned judge once stated: " . . . However hard and disagreeable may be the task in times of popular passion and excitement it is the duty of the courts to set their faces like flint against this erosive subversion of the judicial process". *Bridges* v. *United States,* 184 F.2d 881, 887 (9 Cir. 1950), opinion by Healey, *J.*

Reliance by appellant upon incompetent, unauthenticated documents and irrelevant, immaterial and unsubstantiated statements of alleged fact, wholly unrelated to the record in this case in either the state or federal courts, is a mark of the weakness of appellant's substantive positions in these proceedings. Indeed, it is curious that although appellant has chosen to append to its brief purported pamphlets and documents allegedly issued by "apostles of violence", the appellant has not seen fit to set forth the two leaflets which the indictment in this case charged appellee Harris with distributing. The point is that appellant overlooks the fact that these are judicial proceedings where the rights of persons under the Constitution must be decided by due process of law. These are not legislative inquiries where frenetic and extreme appeals by executive officers unhappily receive a more attentive ear.

The real significance of the unseemly presentation under "A" of appellant's brief is the light thrown upon the construction of the California Criminal Syndicalism Act by representatives of the State. It is plain that the State is attempting to defend and maintain the Criminal Syndicalism Act intact. The rights to "advocate", or "teach", or "justify", or "print", or "publish", or "edit", or "issue", or "circulate", or "publicly display" or "organize", or "become a member" are to be sacrificed to governmental control in the interest of what the State considers to be desirable public policy. It is not unlawful conduct which is the thrust of appellant's hysterical appeal, but it is "literature" which allegedly "reinforces the distorted perceptions of sick minds" and "speech" which is "quite literally, a lethal weapon" (Br. 14).

There is no basis for, and no merit to, appellant's contention that the Act is necessary to deal with violent action or incitement to action. In the first place, the statute is a "speech" statute, not a conduct statute. In the second place, appellant's extraneous discussions and attached exhibits make it perfectly clear that the statute is intended to be used against persons as a means of suppressing speech, press, assembly, and the right to petition for redress of grievances. In the third place, the Act cannot be supported as a means of dealing with unlawful conduct or speech brigaded with unlawful conduct. California is protected with a plenitude of existing criminal legislation.[3] The point

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[3] See, California Penal Code §§69 (obstructing or resisting executive officers in performance of their duties, attempts, threats, violence); 148 (resisting, delaying or obstructing an officer); 148.2 (illegal conduct at burning of building); 182 (conspiracy); 187-190.1 (murder); 192-193 (manslaughter); 203-204 (mayhem); 207-210 (kidnapping); 211-213 (robbery); 214 (train robbery); 216 (administering poison); 217 (assault with intent to commit murder); 217.1 (assault or attempt to kill executive or judicial officers); 218-219 (train wrecking); 219.1-219.3 (throwing missiles and hard substances at trains and common carriers); 220 (assault with intent to commit rape, sodomy, mayhem, robbery or grand larceny); 221 (assault with intent to commit other felony); 240-243 (assault and battery); 244 (assault with caustic chemicals); 245 (assault with deadly weapon); 246 (shooting at inhabited dwelling or occupied building); 375 (places of public assembly; injurious, nauseous, or offensive substance); 403 (disturbance of public assembly or meeting); 404-405 (riot and incitment to riot); 407-409 (unlawful assembly, remaining present after warning to disperse); 415 (disturbing the peace); 416 (assembly for purpose of disturbing peace or commiting unlawful act, refusal to disperse); 417 (drawing, exhibiting or using firearm or deadly weapon); 447a-449c (burning of private buildings, personal property, trailer coaches, bridges, crops, etc.); 451a (attempts to burn, acts preliminary or in furtherance thereof); 452 (possession of flammable, explosive or combustible material or substance, or device; possession, manufacture or disposal of fire bomb); 454 (violation of arson statutes during insurrection, state of disaster or extreme emergency); 467 (deadly weapons, possession with intent to assault); 468 (sniperscope, unlawful possession); 518-520 (extortion); 587-593c (malicious in-

is that the Criminal Syndicalism Law is not directed against those who commit or actually plan violence, but against those who express or hold opinions deemed objectionable or distasteful by the State.

B. 1. Appellant does not seriously question the thesis that the provisions of the California Criminal Syndicalism Act are unconstitutional on their face. Appellant agrees that the District Court was "obliged to consider anew the precise claims raised in *Whitney*" [Br. 15]. Having made this concession, it appears plain, it is submitted, that the decisions of this Court since *Whitney* have so interpreted the provisions of the First Amendment as to render such statutes as the California Criminal Syndicalism Act plainly unconstitutional. *United States* v. *Robel*,

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juries to railroad bridges, highways, bridges and telegraphs); 602 (trespasses constituting misdemeanors); 602.5 (unauthorized entry of property); 602.7 (refusal to leave state college or university property); 602.9 (disruptive presence at schools); 603 (forcible entry, vandalism); 622 (injuring works of art or improvements in municipalities); 624 (injuries to waterworks, facilities or pipes); 647 (disorderly conduct); 647a (vagrancy, child molestation); 647b (loitering about adult schools, pupil molestation); 647c (obstruction of street, sidewalk, or other place open to public); 650 ½ (injuring person or property, disturbing or endangering peace or health); 653g (loitering about schools or public places); 653k (switch-blade knife, carrying, sale or disposition); 659 (misdemeanor concealing or aiding); 663-665 (attempts); 723-727 (suppression of riots); 830-830.6 (definition of peace officers); 833 (possession of dangerous weapons, right of peace officers to search and seize); 834a (resistance to arrest by a peace officer); 835-835a (use of force to effect arrest); 863 (peace officers, arrest with or without warrant); 4600 (demolishing prisons or jails); 12001-12002 (pistols, revolvers and firearms capable of being concealed); 12020-12031 (blackjacks, concealed explosive or dagger, arms in holsters or sheaths, loaded firearms, etc.); 12200-12220 (unlawful possession of machine guns); 12301-12307 (destructive devices); 12400-12420 (shells, cartridges, bombs and tear gas); 12520 (firearm silencers).

389 U.S. 258; *Zwickler* v. *Koota,* 389 U.S. 241; *Keyishian* v. *Bd. of Regents,* 385 U.S. 589; *Bond* v. *Floyd,* 385 U.S. 116; *Garrison* v. *Louisiana,* 379 U.S. 64; *New York Times Co.* v. *Sullivan,* 376 U.S. 254; *Wood* v. *Georgia,* 370 U.S. 375; *Terminiello* v. *Chicago,* 337 U.S. 1; *Thornhill* v. *Alabama,* 310 U.S. 88; *Herndon* v. *Lowry,* 301 U.S. 242; *DeJonge* v. *Oregon,* 299 U.S. 353.

The provisions of the California Criminal Syndicalism Act necessarily curtail activities which are privileged under the First Amendment. The very presence of such a law imposes a substantial burden on protected activities of speech, press, assembly, association and the right to petition for redress of grievances. Criminal syndicalism laws are so patently in conflict with constitutional guarantees that three-judge Federal Courts not only in California but in Mississippi, Georgia and Kentucky have not hesitated to strike down such statutes and enjoin prosecutions and enforcement of such law. See, *Ware* v. *Nichols,* 266 F. Supp. 564 (D.C. Miss. 1967); *Carmichael* v. *Allen,* 267 F. Supp. 985 (D.C. Ga. 1967); *Baker* v. *Bindner,* 274 F.Supp. 658 (D.C. Ky. 1967); *McSurely* v. *Ratliff,* 282 F.Supp. 848 (D.C. Ky. 1967). See also, *Aelony* v. *Pace,* 32 U.S. Law Week 2215, 8 Race Relations Law Rptr. 1355 [ND Ga. 1963, a three-judge court, not otherwise reported]. Discussing the Kentucky criminal syndicalism law, the Court in *McSurely* stated: "It is difficult to believe that capable lawyers could seriously contend that this statute is constitutional" (282 F.Supp. at 852).

2. The essence of appellant's argument is that the California Criminal Syndicalism Act, "construed by our state courts", is constitutional [Br. 15-26]. In this respect appellant is clearly in error as even a cursory review of the

decisions of the California courts with respect to the construction and application of the Criminal Syndicalism Act is concerned. Both the earlier and later state cases patently fail to meet the standards and criteria enunciated by this Court in judging the validity of statutes which affect the exercise of First Amendment freedoms. See also, Dowell, "A History of Criminal Syndicalism Legislation in the United States" in LVII John Hopkins University Studies in Historical and Political Science, 1-176 (1939); Chafee, *Free Speech in the United States,* Ch. 10, 326-354 (1941).

In 1919, shortly after the passage of the Criminal Syndicalism Act, the Supreme Court of California declared that the statute on its fact was valid without any extended discussion. *Ex Parte McDermott,* 180 Cal. 783, 183 Pac. 437 (1919). In *People* v. *Malley,* 49 Cal.App. 597, 194 P. 48 (1920), the District Court of Appeal upheld a judgment of conviction under subd. 3 of §2 of the Act prescribing punishment for circulation or display of any book or written or printed matter advocating, teaching, aiding, abetting or advising criminal syndicalism. An indictment following substantially the language of the statute and without specifying the particular books or material involved was held sufficient. The pamphlets and printed matter displayed and exposed for sale at the headquarters of a branch of the IWW were held sufficient to support a conviction under the statute. Since the record showed that the defendant distributed some of the literature under his control "with full understanding of its nature", the Court held that this was sufficient to attribute to defendant an intent to bring about "all such consequences as might reasonably be anticipated from its distribution" (194 Pac. at 54). *Cf., Fiske* v. *Kansas,* 274 U.S. 380; *Hartzel* v.

United States, 322 U.S. 680; *Baggett* v. *Bullitt,* 377 U.S. 360; *Elfbrandt* v. *Russell,* 384 U.S. 11; *Garrison* v. *Louisiana,* 379 U.S. 64.

In *People* v. *Steelik,* 187 Cal. 361, 203 Pac. 78 (1921), the California Supreme Court upheld the Criminal Syndicalism Act as constitutional, against claims that the provisions of the law were uncertain. The Court noted that the language of the statute was "unusually broad and comprehensive, as well as tautological" (203 Pac. at 80). Mere membership in the IWW was held sufficient to justify the conviction under subd. 4 of §2 of the Act. In *People* v. *Taylor,* 187 Cal. 378, 203 Pac. 85 (1921), the California Supreme Court, contrary to *Malley,* held that an indictment under subd. 3 could not be couched in the language of the statute because "each separate act and publication would constitute separate and distinct violations of the statute" (203 Pac. at 90). The statute was otherwise held constitutional and a conviction based on membership in the Communist Labor Party was upheld. *Cf., Wieman* v. *Updegraff,* 344 U.S. 183; *Elfbrandt* v. *Russell,* 384 U.S. 11; *Keyishian* v. *Bd. of Regents,* 384 U.S. 589.

In *People* v. *Wieler,* 55 Cal.App. 687, 204 Pac. 410 (1922), a judgment of conviction was upheld under subd. 3 of §2, when it was shown that defendant "had justified the tactics of the IWW" by calling for the "release of each and every one now serving a sentence as a political or class war prisoner" (204 Pac. at 412-413). In *People* v. *Roe,* 58 Cal.App. 690, 209 Pac. 381 (1922), a judgment of conviction for membership in the IWW was affirmed on the theory that the defendant knew "that said organization advocated and taught criminal syndicalism" (209 Pac. at 387).

In *People* v. *Cox,* 66 Cal.App. 287, 226 Pac. 14 (1924), convictions for membership in the IWW were affirmed. "The usual constitutional objections to the Act in question" were rejected (226 Pac. at 15). "Knowing" membership was held to apply "to one who voluntarily and by action on his part has become and is a member of such an organization. Under such circumstances knowledge is imputed. . . ." (226 Pac. at 16). In *Ex Parte Wood,* 194 Cal. 49, 227 Pac. 908 (1924), habeas corpus was denied to one imprisoned for contempt of court because of violation of an injunction obtained by the Attorney General of the State preventing all of the acts forbidden by the Criminal Syndicalism Act. Procuring new members of the IWW was held to be a violation of the injunction justifying the punishment in contempt. In *People* v. *Thompson,* 68 Cal.App. 487, 229 Pac. 896 (1924), "the criminal character of the IWW" was held sufficient to justify the jury in drawing an inference of guilty knowledge by defendants shown to be members of the organization (229 Pac. at 898). In *People* v. *Stewart,* 68 Cal.App. 621, 230 Pac. 221 (1924), the fact that defendants did not themselves believe in violence did not constitute a defense when the alleged guilty character of the IWW and defendants' membership were shown.

In *People* v. *McClennegen,* 195 Cal. 445, 234 Pac. 91 (1925), the conviction of 26 defendants jointly accused of violating the Criminal Syndicalism Act was upheld. The Supreme Court once again upheld the constitutionality of the statute, holding that if the record showed that defendants were and remained members of the IWW, and the IWW was shown to be an unlawful organization then the convictions were proper. The Supreme Court, on the is-

sue of knowledge and scienter, made the following statement: *"A consideration of the entire subject leads us to the conclusion that proof of the act of joining an organization shown to be such as the statute denounces is a sufficient showing of knowledge of the purposes of the organization"* (234 Pac. at 101) (emphasis added).

In 1931, in *People* v. *Horiuchi,* 114 Cal.App. 415, 300 Pac. 457 (1931), the Syndicalism Act was held properly applied to the Communist Party and its members. The charge in essence was the publication, issuance, circulation and public display of various books, papers, pamphlets, documents, including such things as "advocating unlawful picketing of sheds and fields in the Imperial County" (300 Pac. at 462).

In *People* v. *Chambers,* 22 Cal.App.2d 687, 72 Pac.2d 746 (1937), the Court held that the California Syndicalism Act was not unconstitutional, relying upon *Whitney* and *McClennegen* (72 Pac.2d at 751). Judgments of conviction however were reversed on procedural grounds not relevant here.

In *Danskin* v. *San Diego Unified School District,* 28 Cal. 2d 536, 171 Pac.2d 885 (1946), a provision of the California Education Code, known as the Civic Center Act, authorized school boards to require execution of affidavits to aid in determining whether any person or organization applying for use of school property was a subversive element. An affiliate of the American Civil Liberties Union made application to a school board for use of a school auditorium and was granted the use upon condition that the organization execute a patently unconstitutional loyalty oath. The California Supreme Court struck down so much of the Education Code as authorized such procedure. The

school board, in justifying its action, among other things, argued that it was attempting to supplement the California Syndicalism Act. In dismissing this argument, the California Supreme Court stated that the Act was constitutional, but could only be applied when there was imminent danger that advocacy of the prohibited doctrines would give rise to evils that the State might prevent (171 Pac.2d at 891).

As late as 1955 in *Black* v. *Cutter Laboratories*, 43 Cal. 2d 788, 278 Pac. 905, 914, *cert. dism.* 351 U.S. 292 (1955), the Supreme Court of California held as follows:

> "And in this State the courts have recognized that the type of activity found by the board here to have engaged in by Mrs. Walker—i.e., membership 'in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail'—constitutes a violation of the California Criminal Syndicalism Act. (Pen. Code, §§11400-11402, formerly Deering's General Laws Act 8428; see People v. McCormick (1951), 102 Cal.App.2d Supp. 954, 962, 228 P.2d 349; People v. Chambers (1937), 22 Cal.App.2d 687, 709-713, 72 P.2d 746.)"

See also, *People* v. *McCormick*, 102 Cal.App.2d Supp. 954, 228 Pac.2d 349, 354 (1951).

It is plain from this summary of the California decisions that the California Criminal Syndicalism Act has in the past been constantly construed to punish advocacy of abstract doctrine, to punish the exercise of freedoms of association and assembly, and acts or conduct which

clearly constituted no more than guiltless behavior. The reliance of appellant therefore upon past rulings of the California courts commencing in 1919 and concluding with *Black* v. *Cutter Laboratories* in 1955 is clearly misplaced.

3. In the light of the vagueness, ambiguity and overbreadth of the Act, and the tenuous reliance on the state decisions, appellant is compelled to argue that the District Court "should have interpreted the Criminal Syndicalism Act so as to preserve its constitutionality in light of intervening decisions by this Court" [Br. 18]. This is, of course, a concession by appellant that the statute on its face suffers from constitutional uncertainty and overbreadth and that, under the circumstances, the District Court could not appropriately abstain from holding the Act to be unconstitutional [Br. 18-19].

As to the sweep of the statute and the deterrent to the exercise of First Amendment freedoms, little need be added to the cogent analysis of the District Court below [R. 27-36] and to the analysis of similar broad statutory provisions by this Court in *Baggett* v. *Bullitt*, 377 U.S. 360; *Keyishian* v. *Bd. of Regents*, 394 U.S. 589; and *Dombrowski* v. *Pfister*, 380 U.S. 479. These aforesaid cases also underline the decision of the District Court below not to abstain in the circumstances herein. See also, *Ware* v. *Nichols*, 266 F. Supp. 564 (D.C. Miss. 1967); *Carmichael* v. *Allen*, 267 F.Supp. 985 (D.C. Ga. 1967); *Baker* v. *Bindner*, 274 F.Supp. 648 (D.C. Ky. 1967); *McSurely* v. *Ratliff*, 282 F.Supp. 848 (D.C. Ky. 1967).

Under the criminal syndicalism statute, speaking as it does of "change in industrial ownership or control", or "effecting any political change", any advocacy, teaching,

publication, or association or organization, embracing precepts or doctrines of taxation, integration, reapportionment, social welfare, public ownership, collective bargaining, foreign policy, and a host of political, social and economic changes, would be endangered. The statute would punish any advocacy, teaching, publication and organization if, in the opinion of a judge or jury, such advocacy, teaching, publication or organization included a call for the use of unlawful methods to obtain such lawful ends. Freedom of expression, assembly, and the right to petition for redress of grievances become subject to scrutiny by a trier of the facts so as to determine whether or not advocacy or teaching or other activity includes some reference to "crime, sabotage, unlawful acts of force and violence, or unlawful acts of terrorism". The very existence of the Criminal Syndicalism Act constitutes a deterrent and engenders a chilling effect upon the worker on the picket line, the civil rights marcher in the streets, the teacher in the classroom or the political party critical of the operation of existing institutions. See, *Giacchio* v. *Pennsylvania,* 382 U.S. 399; *Thornhill* v. *Alabama,* 310 U.S. 88; *Cramp* v. *Bd. of Public Instruction,* 368 U.S. 278; *Smith* v. *California,* 361 U.S. 147; *NAACP* v. *Button,* 371 U.S. 415; *Aptheker* v. *Secretary of State,* 378 U.S. 500; and *United States* v. *Robel,* 389 U.S. 258.

The argument of appellant that federal courts "should now recognize an obligation to construe state statutes so as to save them from valid constitutional objections" [Br. 19] clearly lacks merit. Appellant appears to be arguing that the District Court should have construed the California Criminal Syndicalism Act the same way as the state criminal anarchy statute was construed in *People* v. *Epton,*

281 N.Y.S.2d 9, 227 N.E.2d 829 (1967), *cert. denied,* 390 U.S. 29, 976 (1968) [Br. 18], and indeed a portion of appellant's brief is essentially devoted to the argument that the District Court should have put the *Dennis* gloss upon the statute and thus purportedly saved the statute from constitutional infirmity [Br. 19-26]. Aside from the fact that the District Court below could not appropriately make such a construction, appellees submit that the call for a *Dennis* gloss should be rejected. As the District Court observed below, it is doubtful in the first place that *Dennis* can be properly resorted to in the light of the subsequent decision in *Keyishian* [R. 29-30]. In the light of subsequent decisions by this Court, it is also doubtful that *Dennis* has vitality in situations where statutes as broad and pervasive as the criminal syndicalism and criminal anarchy laws are involved. The "clear and probable" danger rule invoked in the *Dennis* case does not appear to satisfy First Amendment requirements. *Cf., Wood* v. *Georgia,* 370 U.S. 375. Moreover, the Smith Act was construed and applied in *Dennis* under a set of facts where there allegedly existed a highly disciplined conspiracy organized to teach methods of forceable overthrow of government.

Such laws as the Criminal Syndicalism Act are so pervasively censorial and so patently restrictive of the exercise of First Amendment freedoms that no construction in terms of "clear and present danger", "intent", or "incitement to action" can save the statute from constitutional infirmity. The statute would still remain uncertain and overbroad, and the deterrent to the exercise of First Amendment freedoms would still exist. As was stated by this Court in *Keyishian,* 394 U.S. at 599:

> "... The teacher cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts."

What appellant appears to overlook in this entire argument is the fact that appellee Harris requested the California Superior Court, District Court of Appeal and the Supreme Court of California to pass on the constitutionality of the California Criminal Syndicalism Act and the state courts declined to do so [R. 6; Br. 7]. Appellee Harris urged the unconstitutionality of the Act before the California Superior Court on a motion to dismiss the indictment and continued to urge the unconstitutionality of the Act in his petition for a writ of prohibition and in his petition for hearing [R. 6]. Unlike the federal courts, the writ of prohibition is traditionally employed in California prior to trial to test the constitutionality of statutes. Prohibition is the main jurisdictional writ to test acts in excess of jurisdiction as is the case in judicial action under an unconstitutional law. 1 Witkin, *California Procedure,* Jurisdiction §115, pp. 378-379 (1954). See, *Camara* v. *Municipal Court,* 387 U.S. 523.

In view of the refusal of the California courts to pass upon the constitutional claims presented, it appears plain that the District Court was duty-bound when the laws and Constitution of the United States were invoked to hold that the California Criminal Syndicalism Act was justifiably

attacked on its face as abridging free expression and other First Amendment freedoms. Having undertaken to consider the validity of the state law, the District Court had no other recourse but to declare the Act patently unconstitutional.

II.

The District Court Had Jurisdiction to Decide the Constitutional Issues Presented by Appellees in Their Complaint.

Appellant argues that the District Court was without jurisdiction to afford appellees declaratory relief with respect to the constitutionality of the California Criminal Syndicalism Act. In effect, appellant urges lack of standing and absence of an actual controversy. Appellant does not dispute the fact that appellee Harris had standing, but urges that appellees Dan, Hirsch and Broslawski did not.

In the first place, the complaint alleges that appellees Dan and Hirsch are members of the Progressive Labor Party which advocates doctrines and precepts seeking change in industrial ownership and control and effecting political change. The complaint also alleges that appellee Broslawski in his capacity as instructor of history teaches about the doctrines of Karl Marx and reads from the Communist Manifesto and other revolutionary works as part of his teaching. All appellees allege that by reason of the existence of the Criminal Syndicalism Act and the prosecution of appellee Harris they feel inhibited in and uncertain about their advocacy and teaching, as aforesaid [R. 5]. Appellant in the District Court moved to dismiss the complaint and therefore accepted these allegations as

true. See, *Walker Process Equipment* v. *Food, Machine and Chem. Corp.*, 382 U.S. 172, 174-175.

Appellant argues that appellees, Dan, Hirsch and Broslawski "stood in no danger of prosecution" [Br. 28] and therefore no controversy was presented. Appellant overlooks however that the complaint prayed not only for an injunction but for a declaratory judgment that the Criminal Syndicalism Act was unconstitutional on its face in violation of the First and Fourteenth Amendments.

In *Dombrowski,* this Court held that where a statute has an overbroad sweep and is plainly restrictive of First Amendment freedoms, the very presence of the statute itself is a denial of fundamental freedoms. This Court emphasized that defense of a criminal prosecution will not always assure vindication of constitutional rights, that the threats of sanctions may deter almost as potently as the actual application of sanctions. This Court emphasized that in the light of constitutional protections, persons were not required to risk prosecution to test overbroad statutes, and this Court gave as an example the fact that attacks on such overlybroad statutes have been permitted without requiring a showing by the persons making the attack that their own conduct could not be regulated by a narrowly drawn statute. Such a rule, it was pointed out in *Dombrowski,* was enunciated because of the danger of tolerating in the area of First Amendment freedoms the existence of a penal statute susceptible of sweeping and improper applications. Indeed, this Court stated: "So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one" (380 U.S. at 494).

Moreover, it is inappropriate for appellant, who has made clear in his brief before the Court [Br. 10-15, and Appendix] that the State proposes to use every provision of the Act if it is permitted to do so, to argue that no "controversy" is presented. The appellant has accepted the fact that appellees Dan, Hirsch and Broslawski desire to advocate and teach principles, precepts and doctrines plainly protected by the provisions of the First Amendment but feel inhibited and uncertain as to their rights to do so in the light of the Criminal Syndicalism Act. This fear of curtailment of protected behavior, this uncertainty as to how to pattern one's speech, advocacy and teaching to avoid sanctions under the statute, is clear evidence of appellees' standing and the District Court's jurisdiction to adjudicate their claims for declaratory relief.

The decisions of this Court, as well as the lower courts, are completely opposed to appellant's position. See, *Baggett* v. *Bullitt,* 377 U.S. 360, 363-364; *Dombrowski* v. *Pfister,* 380 U.S. 479; *Zwickler* v. *Koota,* 389 U.S. 241; *Kirkland* v. *Wallace,* 403 F.2d 413, 415, n. 4 (5 Cir. 1968); *Baldwin* v. *Morgan,* 251 F.2d 780, 787 (5 Cir. 1958); *Carmichael* v. *Allen,* 267 F.Supp. 985, 994 (D.C. Ga. 1967). The recent decision of this Court in *Golden* v. *Zwickler,* October Term 1968, No. 370, 37 L.W. 4185 (March 4, 1969), does not support appellant. In that case, the allegations of the complaint focused on a particular candidate who subsequently was appointed to judicial office. The plaintiff's concern with the distribution of anonymous literature therefore came to an end so far as the record showed. The New York statute prohibited only anonymous handbills directed to election campaigns.

On the record here, in the light of the provisions of the statute and in the light of the admitted allegations in the complaint, the issues presented to the District Court were not abstract but presented a substantial controversy.

III.

California Penal Code §§11400-11402, the Criminal Syndicalism Act, Have Been Superseded and Preempted by Congressional Legislation.

It is of course settled that where the Federal Government has occupied a field, that field is preempted and the States may not act. *Pennsylvania* v. *Nelson,* 350 U.S. 497; *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218; *Hines* v. *Davidowitz,* 312 U.S. 52.

The field of sedition has been pervasively occupied by congressional legislation. See the Smith Act (18 U.S.C. 2385); the Internal Security Act (50 U.S.C. 781 et seq.); the Communist Control Act (50 U.S.C. 841 et seq.); and other Congressional acts (18 U.S.C. 2381-2391). In *Pennsylvania* v. *Nelson,* the Pennsylvania sedition statute there in question provided in part that the word "sedition" should mean "any . . . utterance, or conduct, . . . the intent of which is . . . to encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or against the United States. . . ." [Pa. Penal Code, 18 Purdon's Pa. Stats. Ann. (1939), §4207].

This Court stated in *Nelson* that the congressional legislation aforementioned has made it reasonable to determine

that no room had been left for the State to supplement it. It was held that a state sedition statute is superseded, regardless of whether it purports to supplement the federal law. This Court added (350 U.S. at 509):

> "Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of state Acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania is unassailable."

On its face, the California criminal syndicalism statute prohibits advocacy, teaching and organizing, affecting both national and state governments and industrial ownership. There is simply no distinction between the state and federal governments in the statute. Indeed the California statute is even broader than the Pennsylvania statute considered in *Nelson,* and the New Hampshire statute involved in *Uphaus* v. *Wyman,* 360 U.S. 72. Moreover, the Smith Act is not limited to advocacy against the United States Government. It expressly covers "the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein."

These words cannot be read out of the statute. It is not to be presumed that Congress inserted words through inadvertence. On the contrary, "Congress said what it meant and meant what it said". *United States* v. *Henning,* 344 U.S. 66. The coverage is carefully designed to be, and it is, all inclusive. Moreover, the inclusion of state and local governments was a necessary step in carrying out the

Federal Government's duty "to guarantee to every State in this union a Republican form of government". U.S. Constitution, Art. IV, §4.

The argument that every State has the right to self-preservation does not erase the fact of preemption, nor the rule of *Nelson*. Of course, the State can take steps to preserve itself, but it must give way in the field of sedition to the pervasive federal scheme. State courts which have considered the matter are in accord that following the *Nelson* case, state sedition, criminal anarchy and criminal syndicalism statutes are superseded. See *Commonwealth* v. *Gilbert,* 334 Mass. 71, 134 N.E.2d 13; *Commonwealth* v. *Hood,* 334 Mass. 76, 134 A.2d 12; *Commonwealth* v. *Dolson,* 183 Pa.Super. 339, 132 A. 692; *Braden* v. *Commonwealth,* 291 S.W.2d 843 (Ky.); *State* v. *Jenkins,* 236 La. 300, 107 So.2d 648; but *cf. State* v. *Cade,* 244 La. 534, 153 So.2d 382. See also, *Albertson* v. *Millard,* 345 Mich. 519, 77 N.W.2d 104, holding Michigan's "Little McCarran Act" to be superseded.

Uphaus v. *Wyman,* 360 U.S. 72, does not militate against appellee's position. There is nothing in that case which permits the conclusion that the Court was sanctioning state sedition prosecutions for advocacy of overthrow of state or local governments or for advocacy of criminal syndicalism. All that *Uphaus* did was permit the State to make investigative inquiries as to matters which may have affected state interests. But this is a far cry from sanctioning state sedition prosecutions. Moreover, it must be remembered that the actual inquiry to Dr. Uphaus was with respect to his registration list or cards—information which was required to be kept by every place of accommodation in the State.

In *Dombrowski* v. *Pfister,* 227 F.Supp. 556 (D.C. La. 1964), reversed on other grounds, 380 U.S. 479, the question of federal supersession was considered. The majority of the three-judge court found no preemption, relying upon *Uphaus*. Circuit Judge Wisdom dissented (227 F.Supp. at 578):

> "*Uphaus* reaffirmed Nelson; it did not overrule *Nelson*. As long as Nelson stands, a State may not define as a crime the same *conduct* Congress proscribes, even though the State's indictment is limited to sedition against the State."

Nelson represents the law today. Of necessity, therefore, California's Criminal Syndicalism Act is unconstitutional.

IV.

28 U.S.C. 2283 Did Not Bar the Grant of Injunctive Relief by the District Court Under 42 U.S.C. 1983.

As initially noted in the brief herein, the question as to whether 28 U.S.C. 2283 deprived the District Court of power to grant injunctive relief against the pending criminal prosecution was not raised by the appellant in the District Court and was not included in the questions presented in appellant's Jurisdictional Statement.

In any event, appellant's position cannot be sustained. In the first place, appellant concedes that §2283 does not involve the jurisdiction of the Court. As early as 1924, this Court held that the Section "does not prohibit in all cases injunctions staying proceedings in a State court". *Smith* v. *Apple,* 264 U.S. 274, 279.

It is therefore not a question of jurisdiction but a question of comity which appellant invokes.

We deal here with a state statute which is clearly unconstitutional. It constitutes a severe and pervasive restriction upon the exercise of basic freedoms. Its language is extremely broad and vague and uncertain. The statute contravenes the First Amendment because it unduly prohibits freedoms of speech, press, the right of assembly and association and the right to petition for redress of grievances. It punishes the advocacy of ideas and makes it an offense merely to publish, print or circulate literature which may be deemed "seditious" by governmental officials. It punishes guiltless behavior and virtually sweeps within its ambit every fundamental idea of social, political or economic change.

It is against the enforcement of this statute by prosecution and indictment that appellee Harris sought the protection of a Federal Court. Under the laws of the United States, appellee Harris was granted the right to seek redress in a Federal Court, and Congress gave the District Court specific jurisdiction to entertain such action and grant appropriate relief. The action instituted by appellee Harris did not affect the power of the State; the action sought relief under the Supremacy Clause of the Constitution of the United States, which makes the Constitution of the United States and the laws of the United States the Supreme Law of the Land. Appellee Harris was seeking the protection of Federal rights in a Federal forum, and a Federal Court was without power to deny him relief.

Under the circumstances, appellees submit that the injunctive relief granted below was "expressly authorized by

Act of Congress" and, indeed, was necessary "in aid of its jurisdiction" and "to protect or effectuate its judgment". Appellees submit that Congress expressly qualified the negative command of 28 U.S.C. 2283 when it enacted the Act of April 20, 1871, the predecessor to 42 U.S.C. 1983. "Certainly section 1983, considered in the context of its legislative history and its role in the federal courts today, is 'incompatable' [sic] with a statute which makes it impossible for any relief to be granted. In those cases, the remedy is completely destroyed. To suggest that this was the intent of the legislators who wrote section 1983, in light of what they said of the importance of protecting federal rights from infringement by the states, and in light of their expressed desire to place the national government between the state and its citizens, is to suggest an untenable conclusion." Note, "The *Dombrowski* Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights" in 21 *Rutgers Law Review*, 92, 124 (1966). See also, Boyer, "Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights" in 13 *Howard Law Journal*, 51-107 (1967).

Not only do law and history support the grant of injunctive relief in §1983 actions, but it is submitted that prosecutions under statutes which are so clearly unconstitutional on their face as are involved herein should be stayed by a Federal Court if the Constitution of the United States and the Laws of the United States are to be upheld in our Federal System. The case herein did not involve the enforcement of a valid statute and the attempt to interrupt a trial in progress by the claim of denial of some Federal right. The case herein involves a threatened prosecution under the statute which all are agreed is facially unconstitutional.

It should be added that appellant's argument against the grant of the injunction appears to be quite tentative. Appellant seems to indicate that the injunction was unnecessary since the declaratory judgment pronouncing the statute invalid would have been sufficient, it being implied that the state officials would not have brought any action to enforce the Act until a final judgment was rendered [Br. 37]. As a matter of fact, the District Court below proceeded very much the way appellant now suggests [R. 38], but the injunction was issued in order not to deprive the appellant "of the right to appeal to the Supreme Court otherwise accorded him by 28 U.S.C. §1253" [R. 38]. Appellant does not appear to deny the State's duty to refrain from enforcing the law once the law was declared unconstitutional, but appears to be objecting to the formal grant of an injunction which was only done to protect appellant's right to appeal.

In any event, appellees submit that the District Court below was entirely correct in holding the statute unconstitutional and in granting injunctive relief to prevent the irreparable injury to appellees and to the community from any enforcement of the said Act, and that §2283 was not a bar to such action by the District Court.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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